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Office of Campaign and Political Finance

One Ashburton Place, Room 411

Boston, MA 02108

Advisory Opinion

July 31, 1998

AO-98-16

Tom Samoluk, Campaign Manager
The Scott Harshbarger Committee
148 State Street – 2nd Floor
Boston, MA 02109

Re: Primary Campaign Expenditure Limits

Dear Mr. Samoluk:

This letter is in response to your July 24, 1998 request for an advisory opinion. You have asked the following questions:

Questions

Would expenditures for ads, which run during the primary election campaign, directed against Harshbarger by Cellucci make Harshbarger an “opposing” candidate within the meaning of M.G.L. c. 55A?

If so, would this fact increase Harshbarger’s campaign expenditure limit to \$4 million or alternatively entitle Harshbarger to make expenditures to rebut or respond to such ads without those expenditures being counted toward his primary campaign expenditure limit of \$1.5 million?

Answer

No to both questions.

Facts

Candidate for Governor Scott Harshbarger (Harshbarger), a Democrat, has agreed to abide by the statutory expenditure limits for the primary as outlined in M.G.L. c. 55, s. 1A and 970 CMR 4.00. All other candidates for Governor, except for Paul Cellucci (Cellucci), a Republican, have also agreed to abide by the statutory expenditure limits of \$1.5 million for the primary election campaign, June 3 through September 15.

Cellucci has stated that he will not abide by the statutory expenditure limits for the primary or the general election. Because a candidate who has so agreed opposes him for nomination as governor in his

party's primary election, Cellucci has filed a statement with OCPF establishing a self-imposed expenditure limit of \$4 million for the primary election campaign.

Your letter states that you believe it is increasingly likely that Cellucci's campaign will make expenditures, in particular for television advertising, during the primary election campaign that will be directed at Harshbarger. You specifically reference and enclose two news articles; one from the *Middlesex News* dated June 15, 1998, and another from the *Boston Globe* dated July 24, 1998.

In the *Middlesex News* article, it states that Cellucci may start "flooding the airways with ads attaching the Democrats before the primary." Cellucci is also paraphrased as stating that "his early ads are already mostly aiming toward the general election, looking over Malone's head." In the *Boston Globe* article there is the suggestion that Cellucci may adopt a campaign plan of "direct attacks against Scott Harshbarger. The article also states that, "The danger for Harshbarger is that Cellucci will begin blasting him on television and he won't be able to respond in kind."

You suggest that chapter 55A and the Public Finance Regulations, 970 CMR 4.00, appear to "allow candidates who have agreed to the statutory limit to make expenditures as described." As I understand your point, you are suggesting that: (1) Harshbarger's campaign expenditure limit should be increased to 4 million, the self-imposed limit established by Cellucci for the primary election campaign, or (2) expenditures by the Harshbarger campaign to rebut or respond to Cellucci ads attaching Harshbarger during the primary election campaign should qualify as exempt expenditures. Such expenditures would be exempted from the \$1.5 million primary election campaign statutory expenditure limit agreed to by Harshbarger.

Discussion

A. Massachusetts's Limited Public Finance System

The Commonwealth of Massachusetts provides for a system of limited public financing of campaigns for statewide elective office. See M.G.L. c. 55A as amended by chapter 43 of the Acts of 1994. Pared down to the essentials relevant for our discussion, the system works as follows.

On or before the last day for filing nomination papers, all statewide candidates¹ must file a "statement" with OCPF that the candidate agrees or disagrees to abide by the relevant statutory expenditure limits for both the primary and the general election. The statutory expenditure limits vary depending on the office sought. As noted, the statutory expenditure limit for candidates for governor is \$1.5 million. See M.G.L. c. 55A, s. 1A(a). Three days later, on the last day for filing withdrawals of nomination, a candidate who did not agree to abide by the statutory expenditure limits and "who is **opposed in said primary** by one or more candidates who have agreed to said limit" must file another "statement." This statement establishes a self-imposed maximum expenditure limit that the candidate agrees to make in his or her "campaign for said **primary**." The primary campaign expenditure limit is, if necessary, increased to the highest amount "stated" by "any opposing candidate who has not agreed to said limit." See M.G.L. c. 55, s. 1A(b).

¹ Statewide candidates are candidates seeking the office of governor, lieutenant governor, attorney general, secretary of state, treasurer and receiver general and auditor.

If a statewide candidate has agreed to abide by the statutory expenditure limits and is otherwise determined to be “eligible” to receive limited public financing in accordance with M.G.L. c. 55, s. 4, the Commonwealth will match that candidate’s “qualified contributions” in the primary election dollar for

dollar.² See M.G.L. c. 55A, ss 4. Matching funds are first distributed to eligible gubernatorial candidates and are subject to availability. See M.G.L. c. 55, s. 5 and c. 10, s. 43. For example, the statutory expenditure limit for the primary election campaign for a gubernatorial candidate is \$1.5 million. A candidate for governor who has agreed to abide by the limit and who is otherwise eligible may, theoretically, be entitled to \$750,000 in matching funds. This year, given the number of eligible gubernatorial candidates who have agreed to the statutory expenditure limit and have opposition and the amount of funds in the State Election Campaign Fund, the maximum amount of public financing available for such a gubernatorial candidate in the primary election is \$219,182.92.

B. Who Are Opposing Primary Candidates?

As noted above, every **primary** candidate who has not agreed to the statutory expenditure limit and “who is opposed **in said primary** (emphasis added) by one or more candidates who have agreed to said limit” must establish a self-imposed expenditure limit. See M.G.L. c. 55A, s. 1A(b). Thereafter, the state secretary must certify those statewide candidates who qualify for the primary ballot and are “opposed by one or more candidates who have qualified for **the same ballot in the primary election** (emphasis added).” See M.G.L. c. 55, s. 2. We interpret these and other sections of chapter 55A to mean that a candidate is opposed only by another candidate seeking the same office in that candidate’s party’s primary election.

The above interpretation is also consistent with election laws generally. For example, only a party that meets the definition of “political party” set forth in M.G.L. c. 50, s. 1 “shall be eligible to conduct primary elections at the . . . biennial state election.” Consequently, “each party having the right to participate in or hold the same may nominate as many candidate for each office for which it has the right to make nominations. . .” M.G.L. c. 53, s. 1. The ballots for each party must “be printed on paper of a different color from that on which the ballots for any other party are printed” and must be identified as the *Official ballot of the [Name of Party]*. M.G.L. c. 53, ss. 33 and 34. Voters registered in one party may not vote in the primary election of the other party and an unenrolled voter must state “in which political party’s primary he desires to vote. . .” M.G.L. c. 53, s. 37 and 38. After the primary election is over, the cast ballots are “sorted into piles, one for each party, and each pile shall be counted and sealed separately.” M.G.L. c. 53, s. 39.

In short, the Democratic and Republican parties will be conducting two separate and distinct primary elections on September 15, 1998, and the various campaign expenditure limits are determined by reference only to candidates seeking nomination in that party’s primary election.

²The public financing provided by the Commonwealth is also limited by the amount of monies available in the State Election Campaign Fund. See M.G.L. c. 10, ss. 42-44.

You also suggest that the primary expenditure limit should be increased if a candidate in one party's primary makes expenditures during the primary election campaign for advertisements attacking a candidate in another party's primary. In our view, such factors simply are not relevant. As noted in Part A, chapter 55A requires the expenditure limits for each candidate to be determined on the basis of statements filed with OCPF. Each candidate must file a "statement" agreeing or not agreeing to the statutory expenditure limit. Each candidate who does not agree to the statutory expenditure limit and is opposed in said primary by a candidate who has so agreed must file a "statement" of the maximum amount of expenditures to be made. The relevant expenditure limits are increased to the highest amount "stated" by an opposing candidate.³ See M.G.L. c. 55A, s. 1A(b).

C. Exempt Expenditures.

You have also suggested that expenditures by Harshbarger's committee to respond to advertisements attacking Harshbarger should not be "assessed against [his] primary cap." Rephrased in the language of the Public Finance Regulations, you believe that the Harshbarger campaign should be able to treat such expenditures as "exempt expenditures" under 970 CMR 4.11.

Section 4.11 of OCPF's Public Finance Regulations recognizes that most expenditures made during the primary campaign period are subject to the primary campaign expenditure limit. Indeed, this section also recognizes that expenditures made before the primary election campaign may also count toward a candidate's primary campaign expenditure limit if made for goods and services used during that period. See 970 CMR 4.11(1)(a).

Paragraph (2) of section 4.11 provides for certain exceptions, i.e. exempt expenditures, to the general inclusionary rule. A candidate may elect to exempt the expenditures enumerated in paragraph (2). These "exempt expenditures" are, however, very specific. Exempt expenditure include only the costs of the candidate's public finance bond, certain expenditures for capital goods and legal services and expenditures for goods or services, or to satisfy liabilities for goods and services, not used during the relevant campaign election.⁴ In addition, the cost of a primary election night party is exempt for unsuccessful primary candidates. See 970 CMR 4.11(2)(a)-(f).

An expenditure qualifies as an exempt expenditure only if the candidate demonstrates that the expenditure falls within one of the above referenced categories. The mere fact that an expenditure made during the primary election campaign responds to an ad or ads attacking Harshbarger that is paid for by Cellucci does not, in and of itself, bring such an expenditure within any of the specifically enumerated regulatory exemptions.

³ The fact that the last prepositional phrase "by any opposing candidate" that is found in section 1A(b) does not include the word primary is not significant. The first sentence of this subparagraph makes its clear that it addresses every candidate "who is opposed in said primary." The latter phrase "opposing" is short hand for a candidate "who is opposed in said primary."

⁴ If either the Cellucci or the Harshbarger campaign make expenditures during the primary election campaign for goods and services which are not used during that campaign, such an expenditure would be an exempt expenditure for the primary. If the goods or services were then used during the general election campaign such expenditures would be considered a prepaid expenditure for the general election campaign and count toward that candidate's general election campaign expenditure limit.

In short, an expenditure counts towards the campaign expenditure limit for the campaign period in which the goods or services purchased are used regardless of the nature or content of those goods or services.

Conclusion

For all the above reasons, it is my opinion that Cellucci does not oppose Harshbarger in his primary election campaign for purpose of establishing Harshbarger's primary campaign expenditure limit. Harshbarger's opponents in the primary election are the other Democratic candidates for governor, Pat McGovern and Brian Donnelly, who have also agreed to the statutory expenditure limit. Harshbarger's limit remains, therefore, at \$1.5 million. In addition, it is my opinion that expenditures made by the Harshbarger campaign during the primary campaign period to respond to political ads attaching Harshbarger paid for by Cellucci are not exempt expenditures for purposes of 970 CMR 4.11.

This opinion is issued within the context of the Massachusetts campaign finance law and is provided on the basis of representations in your letter. Please contact us if you have further questions.

Sincerely,

A handwritten signature in black ink, reading "Michael J. Sullivan", followed by a horizontal line.

Michael J. Sullivan
Director